CASE NUMBER 80-1422

SUPREME COURT OF THE UNITED STATES
OCTOBER 1980 TERM

LOHVLOHN H. REYNOLDS,	:
APPELLANT,	:
VERSUS	:
HAROLD M. REYNOLDS,	:
APPELLEE.	:

ON APPEAL FROM THE COURT
OF APPEALS OF TENNESSEE
EASTERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

I. QUESTIONS PRESENTED BY THE APPEAL

1. Whether the Tennessee statutory scheme for property allocations and alimony awards in divorce actions which was applied in this action created impermissible gender-based distinctions, so as to be unconstitutional under the due process clause of the Fifth Amendment to the United States Constitution?

2. Whether the trial court's application of Tennessee's statutory scheme for property allocations and alimony awards in divorce actions constituted an impermissible gender-based distinction so as to be unconstitutional under the due process clause of the Fifth Amendment to the United States Constitution?

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IV. REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

Plaintiff-appellant is unaware of any publication of the opinion of the Court of Appeals of Tennessee in this matter in the official or unofficial reports of the State of Tennessee nor of any publication of the Order of the Supreme Court of Tennessee denying Application for Permission to Appeal.

V. GROUNDS FOR JURISDICTION

1. This appeal arises from a divorce action and property division in the Circuit Court for Hamilton County, Tennessee, between Lohvlohn H. Reynolds and Harold M. Reynolds in which the trial court awarded a divorce to the defendant Mr. Reynolds and purportedly divided "marital property". The judg-

ment of the trial court was appealed to the Court of Appeals of Tennessee, Eastern Division where it was upheld. Application for Permission to Appeal to the Supreme Court of Tennessee was denied.

2. The opinion of the Court of Appeals of Tennessee, Eastern Division, from which this appeal is taken was entered on September 12, 1980 (Appendix A). Timely Application for Permission to Appeal that opinion to the Supreme Court of Tennessee was denied on November 24, 1980 (Appendix D). Notice of Appeal was filed in the Tennessee Court of Appeals, Eastern Division, the Supreme Court of Tennessee, Eastern Division, and the Circuit Court for Hamilton County by mail, on December 17, 1980.

3. Jurisdiction of this appeal is conferred upon this Court by 28 U.S.C. Section 1257(b).

VI. INVOLVED STATUTES AND CONSTITUTIONAL PROVISIONS

A. Fifth Amendment to the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Tennessee Code Annotated Sections 36-820 through 36-826.

> 36-820. Alimony for support of wife and children - Failure to support children - Attachment -

Bond. --Whether the marriage be dissolved absolutely, or a perpetual or temporary separation be decreed, the court may make an order and decree for the suitable support and maintenance of the complainant and her children, or any of them, by the husband, or out of his property, according to the nature of the case and the circumstances of the parties, the order or decree to remain in the court's control; and, on application of either party, the court may decree an increase or decrease of such allowance on cause being shown. Courts having jurisdiction of the subject-matter and of the parties are hereby expressly authorized to provide for the future support of wives and children, in proper cases, by fixing some definite amount or amounts to be paid in monthly, semimonthly, or weekly instalments, or otherwise, as circumstances may warrant, and such awards, if not paid, may be enforced by any appropriate process of the court having jurisdiction thereof, including levy of execution. The order or decree of the court may provide that the payments for the support of such child or children shall be paid either to the clerk of the court or direct to the mother or other person awarded the custody of said child or children.

In all cases where the husband is directed to pay child support to the clerk of the court, and the

husband is in arrears with said child support for more than sixty (60) days, the clerk of the court shall, upon written application of the mother or other person awarded custody of said child or children, issue an attachment for the husband, setting a date for appearance before the court and setting an appearance bond at not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000). [Code 1858, §2468 (deriv. Acts 1835-1836, ch. 26, §§ 10, 19); Shan., § 4221; mod. Code 1932, § 8446; Acts 1949, ch. 53, § 1; mod. C.Supp. 1950, § 8446; Acts 1970 (Adj.S.), ch. 425, § 1.]

36-821. Portion of husband's estate decreed to wife. - In such case, the court may decree to the wife such part of the husband's real and personal estate as it may think proper. In doing so, the court may have reference and look to the property which the husband received by his wife at the time of the marriage, or afterwards, as well as to the separate property secured to her by marriage contract or otherwise. [Code 1858, § 2469 (deriv. Acts. 1841-1842, ch. 133, § 2); Shan., § 4222; Code 1932, § 8447.]

36-822. Enforcement of decree for alimony and support. - The court may enforce its orders and decrees by sequestering the rents and profits of the real estate of the husband, if he has any, and his

personal estate and choses in action, and by appointing a receiver thereof, and from time to time causing the same to be applied to the use of the complainant and her children, or by such other lawful means as are usual and according to the course and practice of the court, as to the court shall seem meet and agreeable to equity and good conscience.

The wife or other person to whom the custody of the child or children is awarded, shall be entitled to enforce the provisions of the court's orders or decrees concerning the support of such child or children, and to recover judgment for defaults in the payments directed and to obtain execution thereon and otherwise enforce payment thereof, all on behalf of the child or children.

The wife in her own behalf, or the wife or other person to whom the custody of the child, or children, is awarded, may recover from the husband reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion

of such court. [Code 1858, § 2470 (deriv. Acts 1835-1836, ch. 26, § 10); Shan., § 4223; Code 1932, § 8448; mod. C. Supp. 1950, § 8448; Acts 1957, ch. 21, § 1; 1965, ch. 229, §§ 1, 2.]

36-823. Relinquishment of distributive share when wife obtains divorce. - If the bonds of matrimony be dissolved at the suit of the wife, she shall not be entitled to a distributive share in the husband's estate, but in any award of alimony this shall be taken into reckoning in her favor. [Code 1932, § 8450; Acts 1976 (Adj. S.), ch. 529, § 21.]

36-824. Transfer of title to homestead when wife obtains divorce. - If the head of a family is married, and his wife obtain a divorce on account of his fault or misconduct, the title to the homestead shall be vested, by the decree of the court granting the divorce, in the wife, and, after her death, it shall pass to their children. [Acts 1870, ch. 80, § 8; Shan., § 3810; Code 1932, § 7731.]

36-825. Adjustment of interests in jointly owned property. - In all actions for divorce or separate support and maintenance, the court having jurisdiction thereof may, in its discretion, adjust and adjudicate the respective rights and interests of the parties in all jointly owned property, so as to preserve for each or either party,

that portion of such jointly owned property as may be just and reasonable under the facts and circumstances of the case, regardless of how the court may grant or refuse to grant relief in such case; and to this end the court shall be empowered to effectuate its decree by divesting and reinvesting title to such property and, where deemed necessary, to order a sale of such property and to order the proceeds divided between the parties. [Acts 1953, ch. 90, § 1 (Williams, § 8446); 1959, ch. 192, § 1.]

36-826. Relinquishment of interest in husband's property and right to alimony. - If the bonds of matrimony be dissolved at the suit of the husband, the defendant shall not be entitled to any part of his real or personal estate, in case of his intestacy nor to alimony. [Code 1858, § 2473 (deriv. Acts 1835-1836, ch. 26, § 13); Shan., § 4226; Code 1932, § 8449; Acts 1976 (Adj. S.), ch. 529, § 22.]

VII. STATEMENT OF THE CASE

A. Introduction

This appeal arises from a divorce action and property division in the Circuit Court for Hamilton County, Tennessee between Lohvlohn H. Reynolds and Harold M. Reynolds in which the trial

court awarded a divorce to the defendant-appellee Mr. Reynolds, voided a property distribution agreement previously entered into between the parties pursuant to which Mrs. Reynolds was to receive $3,960,000, and divided joint marital property valued between $8,000,000 and $11,000,000 in such a manner as to deprive Mrs. Reynolds of virtually all assets of the marital estate and to leave her saddled with debts and taxes she cannot pay. The trial judge, in analyzing the case, characterized plaintiff-appellant Mrs. Reynolds as being "no more than an office manager and good and dutiful wife", "at most an office manager", "an excellent hostess" with "a high school education" and "more of an obstacle than a help" in regard to business operations. Then, to "secure" her future,

the trial judge awarded Mrs. Reynolds $2,000,000 "gross", against which amount he credited: (a) Three hundred ninety-seven thousand five hundred fifty three dollars ($397,553.00) previously paid to her married daughter; (b) A judgment given to Mr. Reynolds in the amount of one million eight thousand eight hundred ninety-one and 24/100 ($1,008,891.24) dollars; (c) satisfaction of a five hundred thousand dollar loan previously made by Mrs. Reynolds to Mr. Reynolds; (d) The fair market value of any and all other properties titled in the name of Mrs. Reynolds' married daughter which were given to the daughter by Mr. and Mrs. Reynolds, or either of them, during their eight and one-half year marriage; and (e) all other monies which Mrs. Reynolds' married daughter is presently or may be entitled to receive in the

future in connection with the sale of certain mineral properties.

Moreover, Mrs. Reynolds has been required by the trial judge's post-judgment rulings to deposit with the registry of the Court every last one of her assets to satisfy Mr. Reynolds' judgment, thus preventing their utilization in the production of income and impeding her ability to support herself, pay her debts and pursue her rights in this litigation. Add to this the fact that the trial judge left Mrs. Reynolds with tax liabilities and the net result leaves her penniless and far from being "secure" in her future as stated by the trial judge.

Plaintiff-appellant Mrs. Reynolds will demonstrate herein that the Tennessee statutory scheme for property allocations and alimony awards that was

applied in this action created impermissible gender-based distinctions in violation of the Fifth Amendment to the United States Constitution and that the trial court's application of this statutory scheme, constituted an impermissible gender-based distinction so as to be unconstitutional under the due process clause of the Fifth Amendment to the United States Constitution.

B. Trial and Judgment

Plaintiff-appellant Mrs. Reynolds filed her complaint for divorce on or about December 9, 1977 in the Circuit Court for Hamilton County, Tennessee, on the ground of cruel and inhuman treatment. Defendant filed an answer and counterclaim asserting the same ground.

Trial commenced February 7, 1979 without a jury. On March 1, 1979 the trial court issued its memorandum opi-

nion and on April 18, 1979, five days before the Tennessee statutory scheme for property allocations and alimony awards was amended to comply with the directive of Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L.Ed.2d 306 (1979), the trial court issued its judgment in the form of a final Order (Appendix B). The Order provided that the complaint for divorce by plaintiff-appellant Mrs. Reynolds was dismissed with prejudice and that the complaint for divorce by defendant-appellee Mr. Reynolds was granted. Additionally, the Order voided the parties' property distribution agreement entered into in November of 1977, and further provided for the retention of the separate property of the parties which each owned prior to "the meeting of the parties" and a division of the "joint marital pro-

perty". (Specifics of the court's award are discussed in the Reasons for Plenary Consideration.)

C. Legal Argument

1. Tennessee's Statutory Scheme In Effect On April 18, 1979 Was Unconstitutional.

The Tennessee statutory scheme for property allocation and the award of alimony in divorce actions (Tennessee Code Annotated Sections 36-820 through 36-826) which was in effect at the time of the entry of the final Order in this Action (April 18, 1979) provided that different treatment be accorded to the parties on the basis of sex, and thus established a classification subject to scrutiny under the equal protection clause. Reed v. Reed, 404 U.S. 71, 75, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971).

The fact that the classification in large part expressly discriminated against men rather than women does not protect it from scrutiny. Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976). To withstand scrutiny under the equal protection clause, classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. Califano v. Webster, 430 U.S. 313, 316-7, 97 S. Ct. 1192, 51 L.Ed.2d 360 (1977).

In Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L.Ed.2d 306 (1979), the Supreme Court struck down an Alabama statutory scheme similar to that found in the Tennessee Code, Mitchell v. Mitchell, 594 S.W. 2d 699 (Tenn. 1980). In 1980 the Supreme Court of Tennessee,

expressly relying on Orr v. Orr, supra, likewise struck down Tennessee Code Annotated Sections 36-820 through 36-824 as unconstitutional, specifically holding that Tennessee's gender-based approach to providing financial assistance to a needy spouse was not substantially related to the achievement of that objective. The Court also held that Section 36-825, empowering a trial court to adjust the jointly owned property of the parties, was gender neutral, and thus constitutionally sound on its face; and while it did not pass directly on the constitutionality of Section 36-826, it clearly recognized that Section 36-826 contained an unconstitutional gender-based distinction, as did the Tennessee Legislature, when it amended that Section and Sections 36-820 through 36-824 to make them gender neutral effective

April 23, 1979 and May 21, 1979. The trial judge's final Order in this case was issued on April 18, 1979 under the old, unconstitutional statutory scheme.

2. Tennessee's Unconstitutional Statutory Scheme Was Applied In This Case.

While the trial court's final Order of April 18, 1979 purported to divide the jointly owned property of the parties pursuant to Tennessee Code Annotated Section 36-825, manifestly other property than jointly owned property was involved along with other rights of the parties. For instance, divorce was granted in favor of the husband, which under Tennessee Code Annotated Section 36-826 resulted in the defendant wife having no entitlement to any part of the husband's real or personal estate. Since no alimony was awarded in this

Order and the purported separate property of the parties was determined by the trial court and awarded to its supposed owner, it is apparent that Tennessee Code Annotated Section 36-826 was invoked to terminate the entitlement of Mrs. Reynolds to such alimony and a share of her husband's real and personal estate. In fact, Mr. Reynolds' counsel at pages 50 and 51 of his Brief on Behalf of Appellee before the Tennessee Court of Appeals has acknowledged that Tennessee Code Annotated Section 36-826 "comes into play" in this action. No such corresponding provision limiting the husband's rights to his wife's estate in case the wife was awarded the divorce existed under Tennessee law on April 18, 1979. Thus, had Mrs. Reynolds been awarded the divorce, no Tennessee statute then in effect would have

limited Mr. Reynolds' possible award.

As a direct result of this limitation imposed by Tennessee Code Annotated Section 36-826, the following personal and real property was placed out of the reach of any award to Mrs. Reynolds by virtue of the trial judge's determination that it was the non-marital separate property of the husband:

(a) All corporate stock of Paragon Construction Company.

(b) All corporate stock in Reynolds' Homes, Inc.

(c) Lot 55, Mitchell Acres Subdivision.

(d) Lots 7 and 8, Martin Farms Subdivision.

(e) Falling Water Property (105 acres).

(f) Gadd Road property.

(g) One-half (1/2) interest in Green Pond Road property.

(h) Such items of heavy equipment as were owned by Harold Mitchell Reynolds on October 20, 1971, and which are still in his possession. (April 18, 1979 Order, p. 9.)

This determination of separate non-marital property, while ostensibly undertaken pursuant to Tennessee Code Annotated Section 36-825, was effective to remove it from the scope of any claim by Mrs. Reynolds against Mr. Reynolds' real or personal estate because of the operation of Tennessee Code Annotated Section 36-826.

Moreover, while Tennessee Code Annotated Section 36-826 operated in this case to remove Mrs. Reynolds' entitlement to any portion of Mr. Rey-

nolds' real or personal estate in case of his intestacy, no such statutory limitation was or could have been placed on Mr. Reynolds by the statutory scheme then in effect regardless of his conduct or whether a divorce was granted to Mrs. Reynolds instead of him.

Beyond the obvious operation of Tennessee Code Annotated Section 36-826 in the Trial Judge's final Order of April 18, 1979, and the resulting unconstitutional application of Section 36-825 as discussed above, a careful review of the Judge's Order clearly reveals that his entire analysis of the evidence and his conclusions based thereon constitute a direct application of the old Tennessee statutory scheme for property allocations in divorce actions requiring different treatment to be accorded the parties on the basis of

sex. The clear objective of this scheme which permeates old Sections 36-820 through 36-826 is a preference for allocation of family responsibilities under which the wife plays a dependent role, and the objective of the statute appears to be the reinforcement of that model among the state's citizens. The provisions regarding allocation of property reflect the objective of maintaining the antiquated and now rejected societal roles of husband and wife. This purpose cannot sustain the statutes. Stanton v. Stanton, 421 U.S. 7, 10, 95 S. Ct. 1373, 43 L.Ed.2d 688 (1975); Orr v. Orr, supra (1979).

The trial judge's final Order of April 18, 1979 is permeated with evidence of his strict adherence to the unconstitutional objective of this statutory scheme as demonstrated by the

following direct quotes from his final Order:

> The Court determines that Mrs. Reynolds was no more than an office manager and a good and dutiful wife before her deception. In regard to business operations, she was more of an obstacle than a help. (April 18, 1979 Order, p. 7, emphasis added)
>
> The Court feels that Mrs. Reynolds was at most an office manager with most of the bookkeeping done by an accountant. She was an excellent hostess. She had a high school education and had attended business school. Mr. Reynolds graduated from Georgia School of Technology and had a number of years experience in real estate, equipment repairs and sales. He is approximately ten years older than she. (April 18, 1979 Order, p. 6, emphasis added)

The clear and undeniable import permeating the entire Order (which is Appendix B attached to this Statement) is that the contributions of a "good and dutiful" wife to a marriage do not count as much as those of the Husband. As a result, in this action the wife received

a "gross" award of one-quarter to one-sixth or less of the parties' joint estate, depending on whose figures are accepted. When Mrs. Reynolds' net award is calculated and her tax obligations and other living expenses are considered, she is left with virtually nothing out of an $8,000,000 to $11,000,000 estate. As held in Stanton v. Stanton, supra, (1975) the "old notion" that "generally it is the man's primary responsibility to provide a house and its essentials", can no longer justify a statute that discriminates on the basis of gender. The Trial Judge on the face of his opinion has unabashedly evoked these old notions, and through the operation of Tennessee Code Annotated Sections 36-825 and 826 has employed them to deprive the wife of the great majority of the parties' joint estate.

D. Post Judgment Motions And Appeals

The decision of the Trial Court was based entirely upon the application of Tennessee's unconstitutional statutory scheme for property allocation and alimony determination in divorce actions. Accordingly, Plaintiff filed a motion for new trial, motion for judgment or directed verdict, motion for reconsideration or, in the alternative, motion to alter or amend judgment and an amendment to said motion based in part upon the application of Tennessee unconstitutional statutes in contradiction to the Fifth Amendment to the United States Constitution.

This Motion was argued on August 23, 1979, four full months after these statutes were amended to take their present gender-neutral form; however, on

September 11, 1979, the trial court (in an Order attached hereto as Appendix C) denied the motion for new trial and related motions without addressing the constitutionality of the statutes (either the old statutes or the amended versions) or their application in this case. Accordingly, an appeal was duly filed to the Court of Appeals of Tennesee, Eastern Division.

Plaintiff-appellant Mrs. Reynolds timely filed her Brief and Written Argument before the Court of Appeals of Tennessee on March 24, 1980 again raising the issues of the constitutionality of the Tennessee property division and alimony statutes and their application by the trial court asserting in her assignment of errors that:

> The division of joint property and the award of the marital home, assets and income to the defendant was an award of alimony resulting

from an unconstitutional gender-based statutory scheme or constituted an award which was not authorized by statute and law; and that

The trial court's reservation of each spouse's separate property offends equal protection and due process.

Despite this application of the unconstitutional provisions of Tennessee statutory law, the Court of Appeals of Tennessee did not address this issue. Instead it found at the end of its Opinion (Appendix A) that the issues not addressed in its opinion had been considered and were either overlapping, moot or unsupported by law or evidence.

Thereafter, plaintiff-appellant filed and served an Application and Supplemental Application for Permisssion to Appeal to the Supreme Court of Tennessee on October 9, 1980 and November 11, 1980, respectively. These Applications were summarily denied

without opinion in an Order of the Tennessee Supreme Court entered on Novemer 24, 1980 (Appendix D).

VIII. REASONS FOR PLENARY CONSIDERATION

A. Tennessee's Unconstitutional Statute and Its Application

Tennessee's statutory scheme for property allocations and alimony awards and its application by the trial court in this case constitute an impermissible gender-based distinction so as to be unconstitutional under the due process clause of the Fifth Amendment to the United States Constitution.

B. Failure Of The Lower Court To Address The Issue

No court that has heard this case below has addressed this issue in its opinion, judgment or order.

C. Gross Injustice Resulting From The Trial Court's Award

Appellant Mrs. Reynolds has been deprived of virtually all assets of the marital estate and saddled with a judgment owed to Mr. Reynolds and a tax bill she will not be able to pay as a result of the actions, or more appropriately, inactions, of the courts below. This situation was created by the final Order of the trial court as follows:

1. Trial Court's Findings Of Fact And Conclusions Of Law

Approximately one week before this divorce action was filed, Mr. and Mrs. Reynolds entered into an agreement of distribution to distribute between themselves and Mrs. Reynolds' married daughter the proceeds of the sale of their wholly owned corporation,

the Gold Fields Mining Corporation, for $10,000,000 (Mrs. Reynolds daughter owned a 10 percent interest). In his final Order of April 18, 1979 (Appendix A), at pages 7 and 8 of the Conclusion, the Judge held that "[t]he agreement of distribution which has been signed by the parties [in November 1977] is declared null and void and must be vacated because it did not in any way meet the understanding of the parties." The Court had previously found at page 4 of its final Order that Mrs. Reynolds was entitled to $3,960,000.00 and in fact had received $2,571,545.50 from this November, 1977 transaction. The Court further found that Mrs. Reynolds had withdrawn $39,792.76 from a bank in November of 1977, and it was also admitted by the parties and recognized by the Court that Mrs. Reynolds had already

loaned Mr. Reynolds $500,000.00 out of the funds which she received from this transaction. Thus, in November of 1977, Mrs. Reynolds held $2,111,338.26 of the parties' assets.

In lieu of Mrs. Reynolds' share in the agreement of distribution found to be null and void, and apparently in lieu of the money withdrawn by her in November of 1977, the trial judge concluded:

> Mrs. Reynolds' future will be secured by a total distribution to her of two million dollars gross, including any part which her daughter has received. (April 18, 1979 Order, p. 7, emphasis added)
>
> ....
>
> The Court finds that Mrs. Reynolds is responsible for her daughter having received any monies and that there is no consideration from the daughter which justified her receiving these funds. The Court holds that the daughter is not entitled to any funds due to fraud on the part of her mother in having this distribution made. Should a court determine that the daughter is entitled to the three hundred ninety-seven thousand ($397,000) Dollars which she received and any sums which she

claims due, Mrs. Reynolds will pay this out of her two million dollars.

Any taxes assessed against the two million dollars will be paid by Mrs. Reynolds. (April 18, 1978 Order, p. 8.)

2. Trial Court's Implementing Order

Despite these findings and conclusions the trial judge's Order has virtually left Mrs. Reynolds destitute and still indebted to her ex-husband, the Federal government and the State of Tennessee as well as numerous other creditors. This was accomplished by the following provisions of the final Order of the trial court ostensibly carrying out the judge's Findings of Fact and Conclusions of Law outlined above:

3. As her equitable portion of the marital estate under the terms and provisions of T.C.A. 36-825, Mrs. Reynolds is awarded two million dollars ($2,000,000) gross, which amount expressly includes (a) the three hundred ninety-seven thousand dollars

($397,000) which her daughter, Darlene K. Johnston, received at the November 9, 1977, first closing of the sale of certain mineral properties owned by the Reynolds to Gold Fields Mining Corporation, (b) all other monies which her daughter is presently entitled to receive or may be entitled to receive in the future in connection with such sale [this amount is undetermined], (c) the fair market value of any and all other properties titled in the name of her daughter which were given to the daughter by Mr. and Mrs. Reynolds, or either of them, during their marriage [this amount, if anything, is likewise undetermined]. An appropriate portion of the award to Mrs. Reynolds shall constitute payment in full of the $500,000 promissory note, dated November 14, 1977, given by Mr. Reynolds to Mrs. Reynolds immediately after the disbursement of the proceeds from the Gold Fields' sale. It is the express order of the court that, to the extent that Mrs. Reynolds' daughter shall be successful in retaining possession of or title to any of such sums or properties described in (a) through (c) above, then and to the extent of their value, such monies or properties shall be considered as an award to Mrs. Reynolds for the purpose of satisfying the Court's award of the $2,000,000. (April 18, 1979 Order, pp. 9-10, emphasis added.)

Since Mrs. Reynolds was already out

of pocket the $500,000.00 loaned to Mr. Reynolds, the crediting of his $500,000.00 note against her $2,000,000.00 award in effect required Mrs. Reynolds to pay Mr. Reynolds an additional $500,000.00 in order to cancel the note that he owed her. Thus, paragraph number 3 reduced the $2,111,338.26 in fact held by Mrs. Reynolds in November, 1977 to $1,611,338.26 or less depending on: (1) what her daughter ultimately receives from the transaction which was "voided" by the judge; and (2) the amount and value of other money and property given to the daughter during the course of the marriage.

Paragraph 5 of the Order at pages 10 and 11 further reduces Mrs. Reynolds award:

> 5. Mrs. Reynolds, together with her daughter, received from

> the distribution of the Gold Fields sale proceeds [in November 1977] the total sum of $2,969,098.50 plus the additional sum of $39,792.76 which Mrs. Reynolds withdrew from Mr. Reynolds' bank account immediately thereafter. Accordingly, Mr. Reynolds is awarded judgment against Mrs. Reynolds in the amount of $1,008,891.24, unless Mr. Reynolds, at his option, and in his discretion, shall agree to accept securities or other investments in lieu of cash; provided, however, that the value of such securities, or other investments, is mutually agreed upon by the parties. (emphasis added)

Adding the award of paragraph 5 to the effect of paragraph 3, leaves Mrs. Reynolds with $602,447.02 or less, subject to her tax liability on $2,000,000.00.

Furthermore, despite the fact that the trial judge's Order ostensibly attempts to undo the parties' previous distribution agreement and segregate $2,000,000.00 for which amount the Court states that Mrs. Reynolds will be responsible for the payment of income

taxes, he has not undone the transaction but merely attempted to compensate for those portions of the transaction previously carried out through his award of the parties' assets. Accordingly, Mrs. Reynolds' tax liability for the sale of assets in November, 1977 for $10,000,000.00 will be considerably greater than the tax on $2,000,000.00. Perhaps this disproportionate tax burden falling to Mrs. Reynolds could have been remedied in the final Order by adjusting the parties' 1977 tax liabilities between and among themselves to truly reflect the voiding of their 1977 Agreement; however, this was not done, and the trial judge penalized Mrs. Reynolds even further by ordering in paragraph 6 at page 11 the following:

> In regard to all federal and state tax obligations for years 1977 to the present, for which period of time the parties have filed or are

> required to file separate tax returns, neither party shall have any liability to the other with respect to any federal or state tax obligation or any deficiency which may be assessed against the other, each party being separately responsible for, and having all rights, duties and obligations with respect to their own federal and state tax obligations for such years.

While the full extent of Mrs. Reynolds' federal and state tax liability for the year 1977 cannot be specifically determined at this time, it appears that it will be considerably in excess of $602,447.00.

Moreover, while Mrs. Reynolds' assets might be expected to earn income for her pending the final outcome of this litigation, investments that she made in late 1977 for tax purposes have been ruined by this Order and her inability to continue funding the investments. She has been required by the trial judge's post-judgment rulings to

deposit with the registry of the Court every last one of her assets to satisfy Mr. Reynolds' judgment, thus preventing their utilization in the production of income and impeding her ability to support herself, pay her debts and pursue her rights in this litigation, much less "secure" her future.

In a word, unless this Court of final resort hears this appeal and corrects the errors made below, Mrs. Reynolds' future will have been destroyed and a great injustice will have been done.

Respectfully submitted,

T. CULLEN GILLILAND, ESQ.

JOHN C. GRAY, ESQ.

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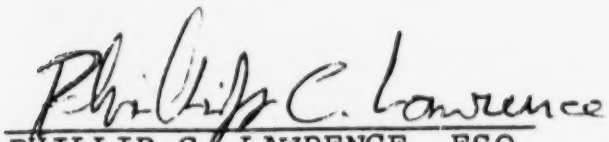

PHILLIP C. LAWRENCE, ESQ.
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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter and the Attorney General of the State of Tennessee with three copies of this Jurisdictional Statement by depositing in the United States Mail copies of same in properly addressed envelopes with adequate first class postage thereon addressed thereto:

James Lee
Attorney for Harold Reynolds
Lee, P.C. and Hanzelik
220 Pioneer Bank Building
Chattanooga, Tennessee 37402

William M. Leech, Jr.
Attorney General, State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219

This 19th day of February, 1981.

T. CULLEN GILLILAND

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

LOHVLOHN H. REYNOLDS,	:	HAMILTON CIRCUIT
Plaintiff-Appellant	:	
vs.	:	HON. ROBERT M. SUMMITT, JUDGE
HAROLD M. REYNOLDS,	:	ENTERED SEPTEMBER 12, 1980
Defendant-Appellee	:	AFFIRMED

LARRY D. WOODS, WITH WOODS, BRYAN & THOMAS, OF NASHVILLE, TENNESSEE, FOR APPELLANT

JAMES C. LEE, OF CHATTANOOGA, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, J.

The Plaintiff has appealed from a judgment of divorce and division of properties.

The Plaintiff-Appellant, Lohvlohn

Holt Reynolds, filed suit against the Defendant, Harold Mitchell Reynolds, on the grounds of cruel and inhuman treatment. She also sought a division of properties.

The Defendant, in turn, filed a cross complaint against the Plaintiff seeking a divorce on the same grounds and asking for an equitable division of their properties.

The court found the issues in favor of the Defendant and Cross Complainant and granted him a divorce. Out of the assets valued by the court at approximately $8,000,000 he awarded the Plaintiff a gross $2,000,000. He charges against this award some $397,553 which had been given to the Plaintiff's daughter by a former marriage. The award to Mrs. Reynolds is also charged with "the fair market value of any and all other

properties titled in the name of her daughter which were given to the daughter by Mr. and Mrs. Reynolds, or either of them, during their marriage." He also ordered that any other sums of money or property which the daughter might be awarded in the future which would come out of the marital properties of Mr. and Mrs. Reynolds shall be charged to the award of Mrs. Reynolds. He gave Mrs. Reynolds her automobile and a reasonable division of the household furnishings. He awarded each of the parties all properties they separately owned at the time of their marriage. He awarded the Defendant, Mr. Reynolds, all of the remaining property and directed him to pay all indebtedness owed as of November 9, 1977. Each of the parties is to be liable for his or her separate state and federal income taxes. He also

awarded a judgment for Mr. Reynolds against Mrs. Reynolds for $1,008,891.24 which was the amount of cash in excess of $2,000,000 which Mrs. Reynolds and her daughter had received from the proceeds of a sale of coal mining interests on November 9, 1977.

The Plaintiff, Mrs. Reynolds, has appealed and presented a statement of issues. The three principal issues are: (1) Whether the court should have granted a divorce to Mr. Reynolds rather than Mrs. Reynolds; (2) Whether Mrs. Reynolds was awarded her equitable share of the marital properties; and (3) Whether the court was correct in declaring a contract between Mr. and Mrs. Reynolds void.

The Plaintiff and Defendant were married in 1971. It was the second marriage for the Plaintiff and the third

for the Defendant. At the time of the separation the Plaintiff was 41 years of age and the Defendant was 52. There were no children born to the marriage but both parties had children by former marriages. The Plaintiff had a high school education and had attended business school. She was employed in a doctor's office earning approximately $150 per week at the time of their marriage. She owned a home in which she had about a $10,000 equity. She owned certain household properties and an automobile. The Defendant graduated from Georgia Tech with a degree in electrical engineering. After graduating from college he worked as an electrical engineer and consultant for a while. He then got into dairy farming, then in the trucking business and later into rather extensive real estate

developments and into the business of buying and selling heavy machinery. Mr. Reynolds estimates his net worth at approximately $325,000 at the time of his marriage. The Plaintiff insists his net worth was substantially less.

Mr. Reynolds' unique and complicated method of doing business makes it difficult to tell just what his net worth was. It was his philosophy that it was to his advantage to always leave the outward impression that he was poor and had few or no assets. He had been a promoter and real estate developer and it was his belief that he could acquire properties more easily and cheaply if people didn't know how much he was worth or what his business connections were. For this reason he put properties in the names of other people and in trust. But after going

through the maze of confusion concerning Mr. Reynolds' properties, we think the proof supports his estimate of his net worth at the time of his marriage.

We think it appropriate to point out here that after the marriage the Defendant pursued his secrecy of his business dealings and began titling property in the name of the Plaintiff.

In 1972 Mr. Reynolds became interested in buying a coal mining operation for $550,000. The Plaintiff was unalterably opposed to his going into the coal business. Their differences over this venture caused considerable domestic strife, with the Plaintiff refusing to sign necessary papers to borrow money on the property which had been titled in her name. The strong determination of both parties resulted in an altercation between them

wherein the Plaintiff attempted to remove a quantity of money from the Defendant's pocket, which he was going to use as a payment on the purchase of the mining properties. As a result of this altercation the Plaintiff was injured and she relied upon this incident as the principal support for her charge of cruel and inhuman treatment.

Following the altercation the Defendant apologized to the Plaintiff for his part in the altercation and they resumed their marital relations on a congenial basis.

The Defendant purchased the mining operation and, in keeping with his practice of not putting properties in his name, he had the stock in the new company, Lucky Cumberland Mining Co., put in the name of the Plaintiff. The Plaintiff gave up her job when she

married the Defendant and during the operation of the Lucky Cumberland Mining operation she worked with the Defendant in running the business. They maintained an office in their home and the Plaintiff wrote checks, handled phone calls and ran errands. Through hard work and shrewd management of the company, some 18 months later the Defendant sold the operation for $2,500,000.

After the sale of the Lucky Cumberland Mining operation the Defendant had considerable coal mining equipment left and he started back in the mining business. Again, he and the Plaintiff had strong disagreements over reinvesting of capital in the mining operations. The Defendant wanted to reinvest in coal land leases and operations on a larger scale than before. The Plaintiff insisted on

investing a substantial amount of the money in something outside of the mining operations for their security in the future. Ultimately, however, the Defendant prevailed.

The Defendant purchased extensive mineral rights, leased other land and purchased considerable mining equipment. For tax purposes the Defendant was advised to form a partnership for the purpose of holding some of the leases. Since the Defendant didn't want to be named as one of the partners, it was decided to use the Plaintiff's 19 year old daughter, Darlene Johnson, as one of the partners. The partnership agreement was drawn to reflect that the Plaintiff's daughter was the owner of ten percent of the partnership.

The new operation carried on by the

Defendant as a proprietorship under the name of HMR Coal Company and in the beginning the Plaintiff was not involved in the operation to any extent. As the Defendant proceeded with his mining operations he was proving up the value of the mineral rights on the land and other companies became interested in buying his holdings. He had an offer of $4,000,000 which the Plaintiff urged him to accept, but he declined. He had another offer of $6,000,000 which she urged him to take, but again he declined. In the spring of 1977 he gave an option to Goldfield Mining Company to purchase the operations for $10,000,000.

In the meantime he had entered into an arrangement with an equipment leasing company, American Leasing Plan, whereby he sold them his mining equipment and leased it back from them along with

additional new equipment. The equipment under lease had a value of approximately 2.3 million dollars. In the latter part of 1976 and the early part of 1977, due primarily to weather conditions, the mining operations were extensively hampered and the Defendant became delinquent on his lease payments to American Leasing Plan. In the meantime the Plaintiff began making numerous telephone calls to the officials of American Leasing Plan and making disparaging remarks about her husband's business ability and integrity. At the same time she was leading them to believe that the success of the business was due to her astuteness and ability. One of the officials described some of his conversations with her as follows: "She was worried sick about the problem, but let me tell you what happened in the

past, when I met Jack Reynolds he was a drunk, he was a bum and he owed people all over town and I paid him off, paid off his debts when we got married, and a figure was banted around, and if I remember correctly, owed a million dollars or something like that, and these conversations became quite protracted at times."

Another official described her conversations with him as follows: "She told me that when they were married that Jack was a drunken bum and that she paid off all of his existing debts, got him out of financial trouble and gave him money to get in the coal business and that her hard work and her perseverance and quite frankly she let me know, believe she ought to be mining coal, that she actually ran the company, that Jack was always chasing rainbows in the

PAGE 54 MISSING FROM ORIGINAL

Defendant it was going to exercise its option to purchase the mining operation for $10,000,000. At this time a real controversy arose between the Plaintiff and Defendant as to how payment of the purchase price would be received. It was the desire of the Defendant to work out a tax free property exchange for most of the payment and receive a relatively small amount of cash. This would have substantially increased the value of their net worth, avoided or postponed a considerable amount of taxes and would have permitted the Defendant to continue in coal mining operations. The Plaintiff, however, insisted on a substantial amount of the purchase price being paid in cash. It was her position that although they had made a great deal of money during their marriage they had always been short on cash flow. She was

fearful they might have financial reverses in future business ventures and lose what they had. It was her insistence that a substantial amount of money should be put in a trust fund for the future security of the two of them. She also took the position she wanted her daughter, Darlene Johnson, to have $400,000 out of the sale.

The parties went to their firm of attorneys to have prepared a settlement and disbursement agreement setting forth the terms of how the purchase price would be received. They could not agree and the Plaintiff hired separate counsel to represent her interest. After prolonged negotiations, and very much to the dislike of the Defendant, an agreement was entered into whereby the Plaintiff was to receive $3,960,000 and her daughter was to receive $450,000.

Since the Defendant was receiving relatively little cash, it was agreed that the Plaintiff would loan him $500,000 for operating capital and he, in turn, would give her a note secured by a lien on various properties. In reaching this agreement, the Plaintiff led the Defendant to believe she was going to place $2,000,000 in trust for their mutual security. The sale was closed on November 9, 1977. The Plaintiff received $2,571,545.50 and the Defendant's note for $500,000. The daughter received $397,553 in cash. The remainder which the Plaintiff and her daughter were to receive was held in escrow to be distributed at a later date.

After the closing the Defendant did not see or hear from the Plaintiff again until about three weeks later when he was served with divorce papers.

The record in this case is very long, consisting of over 2,000 page of testimony and some 200 exhibits. It has not been possible to cover all of the issues and contentions of the parties, but to endeavor to do so would only serve to prolong this opinion.

The trial judge filed an eight-page memorandum opinion and we concur with his findings of fact. The court found that if the Defendant had been guilty of any acts of cruelty toward the Plaintiff she had forgiven him and we think the proof supports this finding. Our courts have held in a number of cases that the acts which might constitute cruel and inhuman treatment may be forgiven and may not thereafter be relied upon except for some new act which brings back to life the former misconduct. Schwalb v. Schwalb, 39 Tenn.App. 306, 282 S.W.2d

661 (1955); Elrod v. Elrod, 41 Tenn.App. 540, 296 S.W.2d 849 (1956).

The court, in addressing Mr. Reynolds' grounds for divorce, alluded to the conversations the Plaintiff had with the officials of American Leasing Plan about Mr. Reynolds and the obstacles she had created in the operation of his business. He further said: "Turning to the grounds for divorce on the part of Mr. Reynolds against Mrs. Reynolds, we find that Mr. Reynolds made all of the conveniences available to his wife, a hundred thousand dollar house and comparable living standard, an automobile, a number of diamonds and six thousand dollars a year to her daughter. He transferred two and one-half million dollars to his wife and three hundred ninety-seven thousand dollars to her daughter. For

Mrs. Reynolds to continue to profess her love for her husband up to the time of the sale of the coal business, indeed having never mentioned divorce prior to her filing; refuse to cooperate in the business, insist upon money set aside for the future security of both and receive it; then leave town in secret and file a bill of divorce, seems in the eyes of the Court, ample evidence of cruel and inhuman treatment toward Mr. Reynolds."

We concur in the court's findings.

The Plaintiff insists the division of properties was inequitable and it was improper for the court to charge her with the funds the daughter had received or may receive in the future.

In making his decision on the division of the properties the court said:

"In considering the proportionate capabilities of the parties and each ones contribution in amassing this fortune, Mr. Reynolds contends she had a greater net worth than her husband. Reviewing the comparative properties of each, she had her homeplace, a three year old Buick and some household furnishings, while Mr. Reynolds had the property recited previously, but titled in her name.

"Mr. Reynolds has borrowed large sums of money before and during the marriage. The lending sources always investigated his financial standing. .... It was Mr. Reynolds' friends who guaranteed the loan for the purchase of the parties' first mining adventure. He made all the contacts in the coal fields and made all the arrangements of financing and selling before he brought

her to the formal signing of documents. Mrs. Reynolds spent much time asking questions in an effort to even understand the complex business transactions which he had brought about.

"Mrs. Reynolds' telephone calls and other complaints to ALP leasing company officials reflecting on her husband's ability to manage the business, created more problems for her husband ....

"Mr. Reynolds was working long hours in the coal mines while Mrs. Reynolds continued to be occupied in the office. Mr. Reynolds revised payment schedules and otherwise remedied the financial situation and continued to prove up coal lands. Ultimately, he secured offers of four million dollars and six million dollars, both offers Mrs. Reynolds urged him to accept. He finally secured and accepted an offer of

ten million dollars. ....

"Mr. Reynolds not only created a ten million dollar estate, but also furnished a hundred thousand dollar house, a fine automobile and six thousand dollars yearly to his wife's daughter, ...

"The Court determines that Mrs. Reynolds was no more than an office manager and a good and dutiful wife before her deception. In regard to business operations, she was more of an obstacle than a help. Mrs. Reynolds future will be secured by a total distribution to her of two million dollars gross, including any part which her daughter has received. ....

"The Court finds that Mrs. Reynolds is responsible for her daughter having received any monies and that there is no consideration from the daughter which

justified her receiving these funds. The Court holds that the daughter is not entitled to any funds due to fraud on the part of her mother in having this distribution made. ...."

We concur with the findings of the court. T.C.A. §36-825 gives the court broad discretion in adjusting and adjudicating the respective rights and interests of the parties in jointly-owned property. In the case of Kittrell v. Kittrell, 56 Tenn.App. 584, 409 S.W. 2d 179, the court said the statute should be "broadly construed and liberally applied to accomplish its objective."

Considering the age of the parties, the fact both had been previously married, there were no children and the marriage lasted for only six years, together with the finding by the court

that the Plaintiff had been a hinderance rather than a help in accumulating the family fortune, we cannot say the court abused his discretion in making the award as he did.

The Plaintiff contends it was error for the court to hold the settlement and disbursement contract of November 9 to be null and void.

The court, in his memorandum opinion, said:

".... He (Mr. Reynolds) contends that she deceived him in her desire to have money set aside in her name for both their future security, by openly professing her love for him and then disappearing with the money immediately after the closing and distribution of it to her. ....

"Mrs. Reynolds was a continuing obstacle at the Gold Field closing.

However, Mr. Reynolds was convinced that she was sincere in her insistence that money be set aside for their future security, and relying upon her representation, he willingly placed these large sums of money in her name and her daughter's name in accordance with his past customary action of placing property in names other than his own to avoid creditors, taxes, and notoriety of his ownership. To satisfy her, he took this action knowing that there would be more taxes because of money received rather than an exchange of properties. ....

"The Court finds that Mrs. Reynolds completely misrepresented to Mr. Reynolds what she intended to do with the money and that this amounts to fraud. Obviously her plan filed to include Mr. Reynolds' security. The

agreement of distribution which has been signed by the parties is declared null and void and must be vacated because it did not in any way meet the understanding of the parties."

Again we concur with the finding of the trial court.

The Plaintiff argues that the court was in error in voiding the contract in that "the requisite elements of misrepresentation were not specifically found and cannot be found in the record." She relies upon the case of Haynes v. Cumberland Builders, Inc., Tenn.App. 546 S.W.2d 228 (1977) in support of her contention.

In our view of that case it supports the ruling of the trial court. At page 232 that court said:

> "When a party intentionally misrepresents a material fact or produces a false impression in order to mislead another or to

> obtain an undue advantage over him, there is a positive fraud. Rose v. Foutch, 4 Tenn.App. 495 (1926). The representation must have been made with knowledge of its falsity and with a fraudulent intent. Schwab v. Walters, 147 Tenn. 638, 251 S.W. 42 (1922); Vela v. Beard, 59 Tenn.App. 544, 442 S.W.2d 644 (1968). The representation must have been to an existing fact which is material and the plaintiff must have reasonably relied upon that representation to his injury. Whitson v. Gray, 40 Tenn. 441 (1859); Dozier v. Hawthorne Development Co., 37 Tenn.App. 279, 262 S.W.2d 705 (1953)."

We think the court's findings of fact meet all of the elements essential to the finding of fraud as set out above.

The Plaintiff also argues the contract was in fact a separation and property settlement agreement and should be treated as such. She relies upon a number of cases dealing with such contracts. However, this was not a separation or property settlement agreement. One of the elements of fraud found by the court was that the

Plaintiff led the Defendant to believe she loved him, they were going to continue to live together, and that the money would be invested for their mutual benefit.

In addressing fraud, our courts have said:

> " 'Fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract. It is as odious and as fatal in a court of law as in a court of equity. It is a thing indefinable by any fixed and arbitrary definition. In its multiform phases and subtle shapes, it baffles definition. It is said, indeed, that it is part of the equity doctrine of fraud not to define it, lest the craft of man should find ways of committing fraud which might evade such a definition.' Smith v. Harrision, 49 Tenn. 230, 242."
>
> Williams v. Burmeister, 47 Tenn.App. 414, 338 S.W.2d 645, 654 (1960).

There are other issues presented in the Plaintiff's brief which we have not addressed separately. However, we have

considered each of them and find them to be either overlapping, now moot or unsupported by law or evidence.

The issues are resolved in favor of the Appellee. The judgment of the trial court is affirmed and the cost of this appeal is taxed to the Appellant.

/s/Clifford E. Sanders
Clifford E. Sanders, J.

CONCUR:

/s/ James W. Parrott
James W. Parrott, P.J.

/s/ Houston M. Goddard
Houston M. Goddard, J.

IN THE CIRCUIT COURT FOR
HAMILTON COUNTY, TENNESSEE

LOHVLOHN HOLT REYNOLDS	:	NO. 40519
	:	DIVISION 1
Plaintiff	:	
	:	DIVORCE DOCKET
-vs-	:	
	:	ENTERED
HAROLD MITCHELL REYNOLDS	:	APRIL 18, 1979
	:	
Defendant	:	

ORDER

This cause came on to be further and finally heard beginning upon the 6th day of February, 1979, upon the original petition filed by Lohvlohn Holt Reynolds, the answer and counterclaim filed by Harold Mitchell Reynolds, voluminous documents and other writings introduced into evidence as exhibits in this cause, the testimony of the parties and other witnesses and upon the entire record in this cause, from all of which it appears and the Court finds

Plaintiff and Cross-Defendant

(herein referred to as Mrs. Reynolds) filed for a divorce on the grounds of cruel and inhuman treatment and prays for an equitable division of the parties' assets due to her capacity in operation of the business. Defendant and Cross-Plaintiff (hereinafter referred to as Mr. Reynolds) denies Mrs. Reynolds' grounds alleged or that she had any business expertise which contributed to the accumulation of the sizeable fortune. Mr. Reynolds cross-filed, claiming that Mrs. Reynolds' misrepresentations amount to fraud and fall under the grounds of cruel and inhuman treatment, thereby entitling him to a divorce. He further states that it was his business ability which created the parties' fortune. There are no children of this marriage.

FACTS

About April, 1971, Mrs. Reynolds came to Mr. Reynolds' real estate company to sell her homeplace. Their relationship ensued and she agreed to marry him. She was employed by a chiropractor at $150 a week plus unknown commissions, had an equity in her homeplace of approximately $10,000, and had a three year old Buick automobile. Mr. Reynolds had interest in the following (some of which he proceeded to place title in the name of Mrs. Reynolds to avoid creditors and the Internal Revenue Service):

1. Paragon Construction Company
2. Reynold Homes, Inc.
3. Lot 55 Mitchell Subdivision
4. Lots 7 and 8 Martin Subdivision
5. Falling Water Property (105 acres)
6. Gadd Road Property

7. One-half interest Green Pond Road property

8. Various heavy equipment

On October 20, 1971, the parties married. Mrs. Reynolds terminated her employment and joined her husband's businesses. Mr. Reynolds was approached at his real estate company to sell a coal mining business and decided to purchase it himself for five hundred fifty thousand dollars ($550,000). To finance this venture, he secured the guarantee of two Atlanta friends, Erskine Frazer and Ralph Matheny, and organized Lucky Cumberland to repurchase the stock from Frazer and Matheny, leaving Mrs. Reynolds as the sole stockholder. After proving up the coal lands, he secured a buyer, Marquette Cement Corporation, for two million five hundred thousand dollars ($2,500,000).

To avoid high rate of taxes, Mr. Reynolds went back into the coal business using most of the proceeds from the Marquette sale. Mrs. Reynolds strenuously objected to this and wanted, for their future security, to put some of the money away so that it could not be touched for future investments. This became a major conflict between the parties.

Due to Mrs. Reynolds refusing to execute documents or to otherwise cooperate in the investments, Lucky Cumberland was liquidated and all of the new business placed in H.M.R. Coal Company, solely owned by Mr. Reynolds. In addition to the business, the parties acquired two houses, the one on Signal Mountain being valued in excess of $100,000, with complementing household furnishings. Mrs. Reynolds operated the

office in the homeplace, opening the mail, answering the telephone, and doing some errands which included the delivery of some parts for the coal mining business. She did not, however, have any control of the business during this period. She was furnished a nice automobile and her daughter by a previous marriage was given six thousand dollars ($6,000) per year.

The business became a very complex operation and it was necessary to enter into various contracts of sale, lease, and buy back. During the winter months little coal was mined and the contract was declared in default. It was necessary to secure a factoring company from North Carolina, The TKC Corporation, with Dr. Fletcher Keith as a principal owner. There is evidence that Mrs. Reynolds had done considerable

telephone calling to various individuals connected to the leasing company, reflecting upon her husband's ability to operate the business. The ALP leasing company then insisted on a contract providing for Mrs. Reynolds to be in control of the business with both Mr. and Mrs. Reynolds' signatures required on checks. However, Mrs. Reynolds never in fact exerted this control.

Mr. Reynolds was working long hours in the coal mines while Mrs. Reynolds continued to be occupied in the office. Mr. Reynolds revised payment schedules and otherwise remedied the financial situation and continued to prove up coal lands. Ultimately, he secured offers of four million dollars and six million dollars, both offers Mrs. Reynolds urged him to accept. He finally secured and accepted an offer of ten million

dollars. Mrs. Reynolds continued her efforts to have set aside a sizeable portion of the proceeds from this sale for the future security of both parties. These discussions went on often and it was finally agreed, at or near the closing, to set aside in Mrs. Reynolds' name three million nine hundred sixty thousand dollars ($3,960,000), and to set aside in her daughter's name four hundred fifty thousand dollars ($450,000). After considerable conflict over the ALP obligation, the sale was concluded to Gold Field Mining Corporation for ten million dollars ($10,000,000). Immediately after the distribution of $2,571,545.50 to Mrs. Reynolds and $397,553 to her daughter, she disappeared. Mr. Reynolds hired detectives to discover her and the money

which she took with her. Two weeks later she was contacted by a divorce suit. He answered and cross-filed for a divorce.

LEGAL ISSUE

Two legal questions must be answered. (1) Were either of the parties guilty of statutory cruel and inhuman treatment. (2) What is an equitable distribution of the properties, considering the contribution of each toward creating this fortune.

ANALYSIS

Mrs. Reynolds avers that Mr. Reynolds, on the occasion that he took some money from the refrigerator and announced that he was going into the coal business, was confronted by her in a playful manner and that he struck her, knocking her down. The second allegation of cruelty was that on the day of closing and distribution he

insisted upon her waiving the marital rights. She says that is when she decided to file for a divorce. On a previous occasion she had discussed with Dr. Keith whether or not her husband loved her and the fact that she loved him but could not go through any more business deals without the guarantee of security. She told Dr. Keith that if she stood up to her husband, she knew she would lose him.

Reviewing the testimony through the first incident above, Mr. Reynolds has a different version of the conflict and states that his wife tried to get the money and tore his pants. He left the house, went to a motel, called her the next day, and that evening returned home and they lived as man and wife. Following this she wrote him laudatory poetry, describing him as he came home

dirty with the "black gold". If there ever was any cruel action in this incident, Mrs. Reynolds certainly forgave him for any such cruelty. After considering the facts that Mr. Reynolds not only created a ten million dollar estate, but also furnished a hundred thousand dollar house, a fine automobile and six thousand dollars yearly to his wife's daughter, the Court does not believe there was any cruelty. To further show his love and affection for his wife, Mrs. Reynolds was given the opportunity to purchase a piece of jewelry on each occasion when he purchased a piece of equipment. Mrs. Reynolds retains diamonds purchased for $40,000.

Mr. Reynolds avers she was guilty of cruel and inhuman treatment in the way she refused to cooperate with him in

accumulating this fortune. He contends that she deceived him in her desire to have money set aside in her name for both their future security, by openly professing her love for him and then disappearing with the money immediately after the closing and distribution of it to her. He contends that all the lawyers were attempting to create a document that would guarantee exactly what she wanted, to prevent him again reinvesting this money. Mrs. Reynolds never contacted him for any explanation or discussion of the provision waiving marital rights, but secreted herself and filed for divorce.

In considering the proportionate capabilities of the parties and each ones contribution in amassing this fortune, Mrs. Reynolds contends she had a greater net worth than her husband.

Reviewing the comparative properties of each, she had her homeplace, a three year old Buick and some household furnishings, while Mr. Reynolds had the property recited previously, but titled in her name.

Mr. Reynolds has borrowed large sums of money before and during the marriage. The lending sources always investigated his financial standing. On one occasion Mrs. Reynolds took her jewelry to a bank but failed to secure a loan. It was Mr. Reynolds' friends who guaranteed the loan for the purchase of the parties' first mining adventure. He made all the contacts in the coal fields and made all the arrangements of financing and selling before he brought her to the formal signing of documents. Mrs. Reynolds spent much time in asking questions in an effort to even

understand the complex business transactions which he had brought about.

Mrs. Reynolds' telephone calls and other complaints to ALP leasing company officials reflecting on her husband's ability to manage the business, created more problems for her husband as both knew they were in default on lease payments. Following liquidation of Lucky Cumberland Corporation, Mr. Reynolds' problems were greatly magnified by Mrs. Reynolds interfering in the business and her actions precipitated the written contract providing for her control of the business which she never exercised except to sign checks.

Mrs. Reynolds was a continuing obstacle at the Gold Fields closing. However, Mr. Reynolds was convinced that she was sincere in her insistence that

money be set aside for their future security, and relying upon her representation, he willingly placed these large sums of money in her name and her daughter's name in accordance with his past customary action of placing property in names other than his own to avoid creditors, taxes, and notoriety of his ownership. To satisfy her, he took this action knowing that there would be more taxes because of money received rather than an exchange of properties.

The Court feels that Mrs. Reynolds was at most an office manager with most of the bookkeeping done by an accountant. She was an excellent hostess. She had a high school education and had attended business school. Mr. Reynolds graduated from Georgia School of Technology and had a

number of year's experience in real estate, equipment repairs and sales. He is approximately ten years older than she.

After the marriage he built on his assets which he turned into 2.5 million dollars, and continuing in the coal business proved up coal lands, got financing and finally closed a ten million dollar sale. Mrs. Reynolds contends the assets greatly exceed ten million dollars while Mr. Reynolds contends that the value is approximately eight million dollars after paying obligations. We find the latter figure to be more correct.

Turning to the grounds for divorce on the part of Mr. Reynolds against Mrs. Reynolds, we find that Mr. Reynolds made all of the conveniences available to his wife, a hundred thousand dollar house

and comparable living standard, an automobile, a number of diamonds and six thousand dollars a year to her daughter. He transferred two and one-half million dollars to his wife and three hundred ninety seven thousand dollars to her daughter. For Mrs. Reynolds to continue to profess her love for her husband up to the time of the sale of the coal business, indeed having never mentioned divorce prior to her filing; refuse to cooperate in the business; insist upon money set aside for the future security of both and receive it; then leave town in secret and file a bill of divorce, seems in the eyes of the Court, ample evidence of cruel and inhuman treatment toward Mr. Reynolds.

CONCLUSION

The Court finds Mrs. Reynolds guilty of cruel and inhuman treatment.

She made her choice for money instead of love. The original bill of divorce is dismissed. Decree for divorce will be entered for Harold Mitchell Reynolds against Lohvlohn Holt Reynolds.

The Court determines that Mrs. Reynolds was no more than an office manager and a good and dutiful wife before her deception. In regard to business operations, she was more of an obstacle than a help. Mrs. Reynolds' future will be secured by a total distribution to her of two million dollars gross, including any part which her daughter has received. (See Ligon v. Ligon 556 SWd 763). The Court finds that Mrs. Reynolds completely misrepresented to Mr. Reynolds what she intended to do with the money and that this amounts to fraud. Obviously her plan failed to include Mr. Reynolds'

security. The agreement of distribution which has been signed by the parties is declared null and void and must be vacated because it did not in any way meet the understanding of the parties.

The Court finds that Mrs. Reynolds is responsible for her daughter having received any monies and that there is no consideration from the daughter which justified her receiving these funds. The Court holds that the daughter is not entitled to any funds due to fraud on the part of her mother in having this distribution made. Should a court determine that the daughter is entitled to the three hundred ninety-seven thousand dollars ($397,000) which she received and any sums which she claims due, Mrs. Reynolds will pay this out of her two million dollars.

Any taxes assessed against the two

million dollars will be paid by Mrs. Reynolds. She is awarded her original homeplace, her present automobile and a reasonable division of the furniture. All other properties, both real and personal, are awarded to Mr. Reynolds. The parties may consider exchange of any properties, such as diamonds, the Falling Water property or the Signal Mountain residence, in determining what will be remitted to Mr. Reynolds from Mrs. Reynolds.

Each party will pay their own attorney's fees and divide equally the court cost. Mr. Reynolds' attorney will prepare the final decree.

It is accordingly, ORDERED, ADJUDGED and DECREED that:

1. The original petition for divorce filed by Lohvlohn Holt Reynolds shall be and the same is hereby

dismissed with prejudice. Harold Mitchell Reynolds, as counter-plaintiff, is awarded an absolute divorce from Lohvlohn Holt Reynolds and both parties are restored to all the rights and privileges of unmarried persons.

2. Each party is to retain the separate property which each owned prior to the meeting of the parties as their separate property and free of claims, each of the other. It is the order of the Court that the following properties are judicially declared and decreed to be the non-marital separate property of the parties as stated and free of marital claims each of the other.

LOHVLOHN HOLT REYNOLDS:

(a) House and lot located at 3608 Altamira Drive, East Ridge, Tennessee.

HAROLD MITCHELL REYNOLDS:

(a) All corporate stock of Paragon Construction Company.

(b) All corporate stock in Reynolds' Homes, Inc.

(c) Lot 55, Mitchell Acres Subdivision.

(d) Lots 7 and 8, Martin Farms Subdivision.

(e) Falling Water Property (105 acres)

(f) Gadd Road Property.

(g) One-half (1/2) interest in Green Pond Road property.

(h) Such items of heavy equipment as were owned by Harold Mitchell Reynolds on October 20, 1971, and which are still in his possession.

3. As her equitable portion of the marital estate under the terms and provisions of TCA 36-825, Mrs. Reynolds is awarded two million dollars ($2,000,000) gross, which amount expressly includes (a) the three hundred

ninety seven thousand dollars ($397,000) which her daughter, Darlene K. Johnston, received at the November 9, 1977, first closing of the sale of certain mineral properties owned by the Reynolds to Gold Fields Mining Corporation, (b) all other monies which her daughter is presently entitled to receive or may be entitled to receive in the future in connection with such sale, (c) the fair market value of any and all other properties titled in the name of her daughter which were given to the daughter by Mr. and Mrs. Reynolds, or either of them during their marriage. An appropriate portion of the award to Mrs. Reynolds shall constitute payment in full of the $500,000 promissory note, dated November 14, 1977, given by Mr. Reynolds to Mrs. Reynolds immediately after the disbursement of the proceeds from the

Gold Fields' sale. It is the express order of the court that, to the extent that Mrs. Reynolds' daughter shall be successful in retaining possession of or title to any of such sums or properties described in (a) through (c) above, then and to the extent of their value, such monies or properties shall be considered as an award to Mrs. Reynolds for the purpose of satisfying the Court's award of the $2,000,000. In addition to the foregoing, Mrs. Reynolds is awarded her present automobile, together with a reasonable division of the household furnishings, including furniture, linens, silverware, china and art works which were acquired during the marriage.

4. All other properties, both real, personal and mixed, of each and every kind and nature, which were acquired during the marriage, regardless

of whose name the property was or is titled in, is awarded to Harold M. Reynolds pursuant to TCA 36-825 as being his equitable portion of the marital properties. Therefore, all rights, title and interests to all real property owned by the parties, jointly or individually, is hereby divested out of Mrs. Reynolds and reinvested in Mr. Reynolds, and Mrs. Reynolds is ordered to execute all documents necessary to conveniently effectuate this order and to vest marketable title in Mr. Reynolds.

5. Mrs. Reynolds, together with her daughter, received from the distribution of the Gold Fields sale proceeds the total sum of $2,969,098.50 plus the additional sum of $39,792.76 which Mrs. Reynolds withdrew from Mr. Reynolds' bank account immediately thereafter. Accordingly, Mr. Reynolds

is awarded judgment against Mrs. Reynolds in the amount of $1,008,891.24 unless Mr. Reynolds, at his option, and in his discretion, shall agree to accept securities or other investments in lieu of cash; provided, however,that the value of such securities, or other investments, is mutually agreed upon by the parties. To the extent that Mrs. Reynolds and/or her daughter, Darlene, do not convey to Mr. Reynolds title to marital properties held in her name, then and to that extent, upon application to the Court, Mr. Reynolds shall be entitled to obtain additional judgment(s) against Mrs. Reynolds.

6. Except as otherwise provided in this decree, Mr. Reynolds shall be solely responsible for any and all of the parties' debts or other obligations which existed on November 9, 1977, the

date of the first closing of the Gold Fields sale, which remain unpaid or unsatisfied as of the date of this decree and which were the subject of proof in the hearing of this cause. All other debts and obligations of the parties shall be borne solely by the party incurring such debt and obligations. In regard to federal and state income tax obligations for years 1971 through 1976, during which period the parties filed or were entitled to file joint income tax returns, Mr. Reynolds shall have all rights, duties and obligations with respect to the income tax obligations and income tax returns filed by the parties for such years and shall be responsible for the payment of any income tax deficiencies which may be assessed by any appropriate taxing authority relative to such

years. In regard to all federal and state tax obligations for the years 1977 to the present, for which period of time the parties hae filed or are required to file separate tax returns, neither party shall have any liability to the other with respect to any federal or state tax obligation or any deficiency which may be assessed against the other, each party being separately responsible for, and having all rights, duties and obligations with respect to their own federal and state tax obligations for such years.

7. Each party is hereby ordered to execute any and all documents, deeds, bills of sale and conveyance, tax forms or claims, and any other documents or instruments required or reasonably necessary in order to implement this decree.

8. Each party shall pay their own attorneys' fees.

9. Jurisdiction of the cause is retained for the purpose of such further proceedings as may be reasonably required in order to fully implement the judgment of the Court. Pending final compliance of the parties with all orders of the Court and discharge of their respective liabilities, each to the other, both parties are restrained from any substantial disposition of assets other than in the normal course of business and in such fashion as to conceal assets or otherwise impair their respective abilities to comply with and to fully perform as herein ordered.

10. It is further ordered that the prior order of the Court adjudging Harold Mitchell Reynolds to be in contempt of Court shall be and is hereby

vacated, set aside and held for naught.

11. The Court costs are taxed against the parties to share and share alike.

This 18th day of April, 1979.

/s/ Robert M. Summitt
Circuit Judge

Approved for entry:

/s/ James C. Lee
James C. Lee
Attorney for H.M. Reynolds

Approved as to form only and without waiver of exceptions heretofore filed:

/s/ John K. Morgan
Morgan, Garner, Wood & Guthrie
Attorneys for L.H. Reynolds

FILE UNDER FIVE-DAY RULE

IN THE CIRCUIT COURT OF
HAMILTON COUNTY, TENNESSEE

LOHVLOHN H. REYNOLDS,	:	
Plaintiff	:	NO. 40519
vs.	:	DIVISION I
HAROLD M. REYNOLDS,	:	ENTERED SEPTEMBER 11, 1979
Defendant	:	

O R D E R

This cause came on to be heard upon the 23rd day of August, 1979, upon numerous pending motions. The Court's action on these pending motions will be dealt with in seriatim.

The first motion argued and disposed of was H.M. Reynolds' motion to require Mrs. Reynolds to pay the balance owing to her former attorney, John Morgan, in order that the lien lis pendens filed against the properties of Mr. and Mrs. Reynolds might be released

as to Mr. Reynolds. It now appearing from the response filed on behalf of Mrs. Reynolds to this motion that Mrs. Reynolds contests Mr. Morgan's claim for fee, the Court concludes that all matters in controversy between Mrs. Reynolds and her former attorneys must be resolved in a separate adversary proceeding (see Palmer vs. Palmer, 562 S.W.2d 833). Said motion is overruled.

Mr. Reynolds thereupon orally moves that the lien lis pendens filed by Mr. Morgan should be released insofar as it pertains to his properties. It being anticipated that this case will be appealed, the Court concluded that this lien should remain in force for the time being, and said motion is, therefore, denied. To which action of the Court Mr. Reynolds excepts.

The next motion to be heard was

that of James C. Lee, attorney for H.M. Reynolds, to strike Paragraphs Four (4) and Five (5) in their entirety from L.H. Reynolds' Motion to Quash Subpoena. This motion is granted and, pursuant thereto, Paragraphs Four (4) and Five (5) of L.H. Reynolds' aforesaid Motion to Quash Subpoena shall be, and are hereby, stricken in their entirety on the ground that same are impertinent and scandalous.

The next motion to be considered was Mr. Reynolds' motion to strike L.H. Reynolds' "Statement Concerning Assets In Response To Court Order" and for an order to require Mrs. Reynolds to show cause why she should not be held in contempt of Court for failure to comply with the Court's order of May 22, 1979. This motion was considered by the Court in conjunction with Mr. Reynolds' prior

motion requesting sequestration of assets pursuant to Rule 64 TRCP. The Court is of the opinion that its order on motion to sequester will resolve all objections to Mrs. Reynolds' listing of assets and Mr. Reynolds' motion is, therefore, denied, to which actions exceptions were noted.

Upon Mr. Reynolds' motion to sequester assets, the Court finds that the entire record in this cause justifies a sequestration of assets for the purpose of securing satisfaction of the judgment of the Court in the event that same is ultimately sustained and becomes final. To this end, Mrs. Reynolds is ordered, directed and mandatorily enjoined to deliver to the Clerk of this Court, for safekeeping, all indicia of her ownership of the following listed assets:

Description of Asset	Stated Value
Two (2) construction loans, North Carolina	$550,000
Loan to limited partnership, Atlanta, Georgia (apartment improvements)	100,000
Loans, etc. Loan to corporation, Atlanta, Georgia (real estate, Charlotte, North Carolina)	100,000
Partnership, Atlanta, Georgia apartments	250,000

The Court notes that the vagueness of the description of the assets to be sequestered is occasioned by reason of the vagueness of Mrs. Reynolds' listing and description of assets in compliance with the Court's prior order of May 22, 1979. Mrs. Reynolds is further ordered, directed and enjoined to file with the Clerk, in addition to indicia of

ownership of the foregoing assets, all security instruments of each and every nature evidencing the pledge of assets to secure the above-identified loans. Mrs. Reynolds is further ordered, directed and mandatorily enjoined to file with the Clerk copies of all partnership agreements, stockholder agreements, balance sheets and operating statements which may be reasonably necessary to enable a valuation to be made of the above-listed assets.

It is the intent of the Court in so ordering and enjoining Mrs. Reynolds that assets to the value of One Million ($1,000,000) Dollars shall be returned by her to the state of Tennessee and deposited with the Clerk of this Court for safekeeping, and that this injunction shall remain in force pending any appeal taken by her, and Mrs.

Reynolds is enjoined to comply with this order within ten (10) days from and after entry. Mrs. Reynolds noted her exceptions to this order of the Court.

The next motion to be considered was that of Mr. Reynolds seeking that the judgment in his favor against Mrs. Reynolds be increased to compensate for loss of interest income suffered by him which was occasioned by an interest forfeiture on a certificate of deposit which the American National Bank required him to cash out prematurely by reason of alleged continued interference with his business relationships by Mrs. Reynolds or those acting on her behalf. Counsel for Mrs. Reynolds, taking the position that the exhibits filed with said motion could not be properly offered into evidence, action on this motion is reserved for the present and

will be disposed of at a later date and prior to final disposition of this cause.

The next motion to be considered was that of Mr. Reynolds praying that Mrs. Reynolds be enjoined and restrained from continued interference between H.M. Reynolds and his various creditors and business associates. Counsel for Mrs. Reynolds requested time to make discovery and to take proof on the issues raised by this motion. Action upon this motion, therefore, is reserved. Pending further order of the Court, Mrs. Reynolds and all of those acting on her behalf or in concert with her, are temporarily restrained from any further and continued contact with any, all, each and every business creditor and associate of Mr. Reynolds with regard to Mr. Reynolds' business affairs, other than through counsel for

Mr. Reynolds. This temporary restraining order shall not apply to contacts and dealings with third parties with regard to any matters other than those involving Mr. Reynolds. Exceptions were noted to this order of the Court.

The next motions considered by the Court were a series of motions filed by Mrs. Reynolds seeking to discover financial information from Mr. Reynolds. Inasmuch as Mrs. Reynolds is not a judgment creditor of Mr. Reynolds, Rule 69, TRCP, does not appear to afford any basis for the discovery which Mrs. Reynolds seeks. These motions are, therefore, denied; to which action Mrs. Reynolds excepts.

The next motion to be considered was that of Mr. Reynolds seeking to strike Mrs. Reynolds' motion for a new

trial upon the ground that there has been no service upon opposing counsel as required by Rule 5 and 59. Counsel of Mr. Reynolds stated that the basis for the motion was technical in nature and presents a question of first impression in Tennessee. By reason of the technical basis for the motion and, although it appears from the record in this cause that there has been no compliance with Rule 59.01 and Rule 5.02 and that the motion, thus, might be well taken in the interest of avoiding error, as suggested by counsel for Mr. Reynolds, the Court denies this motion. To which action of the Court Mr. Reynolds excepts.

The last motions to be considered were Mrs. Reynolds' motion for a new trial, together with numerous supporting affidavits; and Mr. Reynolds' motion to

strike the supporting affidavits.

Although no effort was made, by affidavit or otherwise, to show why these affidavits should be considered as "newly discovered evidence" and although no effort was made by affidavit or otherwise to show why the material therein contained could not have been discovered through the exercise of reasonable diligence prior to trial, and although much of the material in said affidavits would be regarded as irrelevant, immaterial or merely cumulative, the Court, in the exercise of its discretion, denied the motion to strike affidavits. To this action, Mr. Reynolds excepts.

Finally, the Court heard argument of counsel upon Mrs. Reynolds' motion for a new trial, which motion the Court in all things denies. In denying Mrs.

Reynolds' motion for a new trial, the Court makes note of the following:

Many of the alleged errors assigned by Mrs. Reynolds as constituting grounds for a new trial, either directly or by implication, charges that attorneys Tom Caldwell and William C. Myers, who represented the Reynolds' joint business interests prior to Mrs. Reynolds' filing of this divorce action, were guilty of unprofessional conduct in disclosing privileged information. Even if the privilege were not waived as a matter of law by Mrs. Reynolds' filing of the lawsuit and putting into issue the intent of the parties in entering into the distribution and settlement agreement, the privilege was expressly waived in open Court and in the presence of Mrs. Reynolds by counsel acting on her behalf. The Court further notes

that Mrs. Reynolds introduced as her witnesses three attorneys, including one who had previously represented the joint interests of the Reynolds with the waiver of both parties being given to any privilege as it pertained to testimony of her witnesses. In view of the record in this cause, the Court expressly rules that Mr. Caldwell and Mr. Myers were not guilty of any unprofessional conduct in giving their testimony and that no error was committed by the Court in admitting same. Indeed, it is the opinion of the Court that error would have been ommitted had Mrs. Reynolds been permitted to seal the lips of attorneys Caldwell and Myers by a claim of privilege which might have assisted her in perpetuating the fraud which the Court has found Mrs. Reynolds practiced

upon Mr. Reynolds.

The Court further comments upon Mrs. Reynolds' contention that the Court erred in failing to award her homestead. T.C.A. §36-824, as amended, and the cases decided thereunder, make it clear that in order to be entitled to homestead, it must be prayed for in the petition and the divorce must be awarded to the spouse seeking homestead. Mrs. Reynolds did neither, i.e., she did not pray for homestead in her petition (to have done so would have been totally inconsistent with her theory of the case), and she was not awarded to the divorce. The home was awarded to Mr. Reynolds as a portion of his part of the marital properties.

Mrs. Reynolds' motion for a new trial is denied. To which action of the Court Mrs. Reynolds excepts.

The last matter to be acted upon was Mr. Reynolds' motion with regard to occupancy of the Kell Road house and his personal belongings located therein. Throughout the course of these proceedings, in view of Mrs. Reynolds' extensive travels, questions have been raised concerning the amount of time she spends at the home and the extent of the use which she makes of it. Mrs. Reynolds, having again assured the Court that she intends to live there, use and maintain it, it is the order of the Court that for the present she shall be permitted to continue to occupy the Kell Road house.

The Court further orders that Mr. Reynolds shall be permitted to remove certain of his personal property under a rather detailed and complicated plan which was verbally worked out at the

hearing. Either party is granted leave to reapply to the Court in the event that these arrangements cannot be completed as agreed.

ENTER this 11th day of September, 1979, NUNC PRO TUNC.

/s/Robert M. Summitt
JUDGE

APPROVED FOR ENTRY:

WOODS, BRYAN & THOMAS

/s/
Attorneys for Plaintiff,
Lohvlohn H. Reynolds

/s/ James C. Lee
JAMES C. LEE
Attorney for Defendant,
Harold M. Reynolds

I certify that I have served opposing counsel by mailing a copy to them at their last known address with sufficient postage attached.

August 28, 1979.

James C. Lee

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

LOHVLOHN H. REYNOLDS,	:	
Plaintiff-Appellant,	:	
vs.	:	Hamilton Law
HAROLD M. REYNOLDS,	:	ENTERED NOVEMBER 24, 1980
Defendant-Appellee.	:	

O R D E R

Upon consideration of the application for permission to appeal and reply thereto, briefs of counsel and the entire record in this cause, the Court is of the opinion that both the original and the amended and supplemental applications for permission to appeal should be and the same hereby are denied at the cost of appellant.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

LOHVLOHN H. REYNOLDS,	:	
Plaintiff-Appellant,	:	
	:	NO. CA-536
vs.	:	
	:	HAMILTON LAW
HAROLD M. REYNOLDS,	:	
Defendant-Appellee.	:	FILED ON DECEMBER 22, 1980

NOTICE OF APPEAL

Notice is hereby given that LOHVLOHN H. REYNOLDS, Plaintiff-Appellant above-named, hereby appeals to the United States Supreme Court pursuant to 28 U.S.C. §1257(b) from the Judgment of this Court entered in this action on September 12, 1980, Application for Permission to Appeal to the Supreme

Court of Tennessee denied on November 24, 1980.

BY: /s/ Phillip C. Lawrence
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GRAY, GILLILAND, GORDON & HINSON, P.C.

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Attorneys for Plaintiff-Appellant Lohvlohn H. Reynolds

CASE NO. 80-1422

SUPREME COURT OF THE UNITED STATES
OCTOBER, 1980 TERM

LOHVLOHN H. REYNOLDS, :
:
APPELLANT, :
:
Versus :
:
HAROLD M. REYNOLDS, :
:
APPELLEE. :

ON APPEAL FROM THE COURT
OF APPEALS OF TENNESSEE
EASTERN DIVISION

MOTION TO DISMISS OR AFFIRM

COUNSEL OF RECORD FOR
APPELLEE
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TABLE OF AUTHORITIES

CASES CITED:

Orr v. Orr, 440 U.S. 268 . . .6,8,9,10,11

Mitchell v. Mitchell, 594 S.W.2d 699 . 6,7,8,9,10

STATUTES CITED:

Tennessee Code Annotated

§36-820. 2,6

§36-821. 2,6

§36-822. 2,6

§36-823. 2,6

§36-824. 2,6

§36-825. 3,4,7,9,10

§36-826. 2

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Rules of the Supreme Court of the United States, Appellee moves the Court for an Order dismissing this appeal on the following grounds:

(1) The appeal does not present a substantial federal question;

(2) The purported federal question was not expressly passed upon in this case;

(3) The judgment appealed from rests upon an adequate non-federal basis.

Alternatively, appellee moves the Court for an Order affirming the judgment sought to be reviewed on the ground that it is manifest that the purported questions presented are so unsubstantial as to need no further argument.

In fact, the issues as stated by Appellant are not genuine, but are spu-

rious. The Tennessee Code Sections of which Appellant complains (T.C.A. §36-820, 36-821, 36-822, 36-823, 36-824, and 36-826) were not invoked by either party to this suit, were not considered by any Court in reaching a decision in this suit and are totally irrelevant to the decision made in the State Court.

STATEMENT OF THE CASE AS IT PERTAINS TO THIS APPEAL

On December 9th, 1977 Mrs. Reynolds filed suit for divorce in the Circuit Court of Hamilton County, Tennessee. Mrs. Reynolds did not request alimony or child support (T.C.A. §36-820, 821, 822, 823, and 826). Mrs. Reynolds did not ask that "title to the homestead" be awarded to her (T.C.A. §36-824). Mrs. Reynolds made the affirmative request that the Court make an equitable division of the marital properties (T.C.A.

§36-825).

Mr. Reynolds filed an Answer and Cross action wherein he requested a divorce and likewise asked that the Court make an equitable division of the marital properties.

The case was bitterly contested at all stages of the proceedings. The trial lasted for three weeks and the record transmitted to the Tennessee Court of Appeals weighed 108 pounds.

The contested issues were largely factual and financial in nature.

Both parties had been previously married, no children were born of the marriage and the marriage was of comparatively short duration, six years. Incident to a sale of husband's business, wife persuaded husband to sign an agreement placing slightly over $3,000,000.00 in the name of wife and her daughter by a former marriage plus a promissory note

for $500,000.00 from husband to wife. As the Trial Court found, she fraudulently induced husband to do so by representing that she intended to place the funds in trust for the benefit of husband and wife. Instead she disappeared, filed suit for divorce and asked for an equitable division of what husband had left.

Following a three week trial, the Circuit Judge awarded Mr. Reynolds a divorce on his cross petition, set aside the agreement giving wife $3,000,000.00 and the $500,000.00 note as having been obtained by fraud, and divided the marital properties pursuant to T.C.A. §36-825 (Appellant's Appendix "B", page 95).

Mrs. Reynolds, together with her daughter, having received the total sum of $3,008,891.24 cash, the net effect of this was that Mr. Reynolds was awarded judgment against Mrs. Reynolds for

$1,008,891.24, thus leaving her and her daughter with $2,000,000.00. (Appellant's Appendix, page 95).

Mrs. Reynolds filed a Motion for a New Trial in the Trial Court. This Motion was not acted upon until August 23rd, 1979, four months after the statutes of which appellant complains had been amended to make them gender neutral. (Appellant's Appendix "C", beginning at page 101). Her Motion for a New Trial was overruled.

Mrs. Reynolds then appealed to the Tennessee Court of Appeals. By opinion entered September 12, 1980 the Court of Appeals affirmed the Trial Court (Appellant's Appendix "A", beginning at page 41).

Mrs. Reynolds then filed a Request for Permission to Appeal addressed to the Supreme Court of the State of Tenn-

essee. Mrs. Reynolds thereafter filed a Supplemental Request for Permission to Appeal with the Tennessee Supreme Court.

Both the original and supplemental Requests for Permission to Appeal filed by Mrs. Reynolds were denied (Appellant's Appendix "D", page 117).

ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

The issues which appellant seeks to raise have already been considered and decided by the Supreme Court of the State of Tennessee in the case of Mitchell v. Mitchell, 594 S.W.2d 699, decided March 3, 1980. It was there held that T.C.A. §§36-820 through 36-824 and 36-826 were unconstitutional under the decision of the United States Supreme Court in Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306. In the same

case the Supreme Court ruled that Tennessee Code Annotated §36-825 was gender neutral and, therefore, constitutional.

The marital property of the Reynolds' was divided by the Trial Judge pursuant to §36-825. The Code Sections which were unconstitutional prior to their amendment to render them gender neutral played no role in the decision of this case. The unconstitutional Code Sections were not invoked or relied upon by either party and were not regarded by the Court.

Mitchell v. Mitchell, supra was decided by the Tennessee Supreme Court in March of 1980 some six months prior to the decision in this case by the Tennessee Court of Appeals. Obviously, had either the Tennessee Court of Appeals or the Tennessee Supreme Court felt that any of the unconstitutional Code Sec-

tions were material or relevant to the decision in this case, the Trial Judge would have been reversed and the case remanded as was done in Mitchell.

For the Supreme Court of the United States to accept jurisdiction in this case, it must indulge in the presumption that the Tennessee Courts applied statutes which the Supreme Court of Tennessee had already declared to be unconstitutional.

Thus, no substantial Federal question is presented, i.e., the highest Court of Tennessee has already recognized and followed Orr v. Orr. Similarly, the Tennessee Legislature has amended the non-conforming statutes to render them gender neutral.

For the United States Supreme Court to accept jurisdiction would place it in a positioin of doing nothing more than

rendering an advisory opinion upon a moot issue. As already stated in Mitchell v. Mitchell, Tennessee's "statutory scheme" except for T.C.A. §36-825 was unconstitutional prior to amendment by the Tennessee Legislature. These unconstitutional Code Sections were amended two years ago to bring them into conformity with Orr.

THE PURPORTED FEDERAL QUESTION WAS NOT EXPRESSLY PASSED UPON IN THIS CASE.

It is perfectly obvious that the Trial Court found it unnecessary to consider the constitutionality of those portions of the Tennessee Code which dealt with alimony, child support and homestead since these issues were not involved in the lawsuit. The Trial Court's opinion expressly stated that marital property was divided pursuant to T.C.A.

§36-825 which was and remains gender neutral.

Presumably, both the Tennessee Court of Appeals and the Tennessee Supreme Court felt it unnecessary to re-address the constitutional defects which existed in the Code Sections relating to alimony, child support and homestead prior to their amendment following the decision in Orr. These questions had already been addressed in Mitchell and, since these Code Sections were not involved in the decision of the Reynolds case, it was neither necessary nor appropriate that the Tennessee Appellate Courts reconsider these questions.

THE JUDGMENT APPEALED FROM RESTS UPON AN ADEQUATE NONFEDERAL BASIS.

The judgment entered in this case rests upon T.C.A. §36-825 which the Tennessee Supreme Court has previously held to be gender neutral in

conformity with Orr and therefore constitutional.

RESPONSE TO APPELLANT'S REASONS FOR PLENARY CONSIDERATION:

Appellant's attorneys before this Court are her fourth set of attorneys. They did not enter the case until it was before the Tennessee Supreme Court on Request for Permission to Appeal. Consequently, their unfamiliarity with the facts contained in this record is perfectly understandable.

Their conclusions, speculations and computations concerning the effect of the judgment upon Mrs. Reynolds are simply not supported by the record in this case. The simple fact of the matter is that Mrs. Reynolds (and her daughter by a former marriage) are left with $2,000,000.00 subject to the obligation to pay her pro-rata share of the income

taxes resulting from the sale of husband's assets which generated the cash that she received.

Respectfully submitted,

LEE, P. C. & HANZELIK

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter and the Attorney General of the State of Tennessee with three copies of this Motion To Dismiss or Affirm by depositing in the United States Mail copies of same in properly addressed envelopes with adequate first class postage thereon addressed thereto:

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Nashville, Tennessee 37219

This 16 day of March, 1981.

JAMES C. LEE

CASE NUMBER 80-1422

APR 3 1981
ALEXANDER L. STEV
CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER 1980 TERM

LOHVLOHN H. REYNOLDS,	:
APPELLANT,	:
VERSUS	:
HAROLD M. REYNOLDS,	:
APPELLEE.	:

ON APPEAL FROM THE COURT
OF APPEALS OF TENNESSEE
EASTERN DIVISION

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellee's Motion to Dismiss or Affirm purports to be based upon four separate grounds. An examination of his argument on these grounds, however, reveals that they all boil down to one argument; i.e., in rendering its decision in this action the trial court did not invoke Tennessee Code Annotated Sections 36-820, 36-821, 36-822, 36-823, 36-824 and 36-826 which were admittedly unconstitutional at the time judgment was entered by the trial court, but rather it relied solely on Tennessee Code Annotated Section 36-825, which was gender neutral and had previously passed constitutional muster in Mitchell v. Mitchell, 594 S.W.2d 699 (Tenn. 1980).

This argument totally ignores the fact that this divorce was granted in favor of the husband, which under Tennessee Code Annotated Section 36-826

resulted in the defendant wife having no entitlement to any part of the husband's real or personal estate either as alimony or in intestacy. Since no alimony was awarded in the Final Order of the trial court and the purported separate property of the parties was determined by the trial court and awarded to its supposed owner, it is apparent that Tennessee Code Annotated Section 36-826 was invoked to terminate the entitlement of Mrs. Reynolds to such alimony and a share of her husband's real and personal estate. In fact, Mr. Reynolds' counsel at pages 50 and 51 of his Brief on Behalf of Appellee before the Tennessee Court of Appeals (Appendix F attached hereto) has acknowledged that Tennessee Code Annotated Section 36-826 "comes into play" in this action.

Moreover, as pointed out in pages 21-24 of the Jurisdictional Statement, a

careful review of the trial judge's Final Order clearly reveals that his entire analysis of the evidence and his conclusions based thereon constitute a direct application of the old Tennessee statutory scheme for property allocations in divorce actions (Tennessee Code Annotated Sections 36-820 through 36-826) requiring different treatment to be accorded to the parties on the basis of sex.

Accordingly, the basic premise of Appellee's Motion to Dismiss or Affirm is incorrect; and the unconstitutional Tennessee Code Section 36-826 was invoked and relied upon by the trial court in rendering a Final Order in this action.

As a direct result of the limitation imposed by Tennessee Code Annotated Section 36-826, Mrs. Reynolds was deprived of any claims she otherwise

had to a very significant amount of property identified at pages 19 and 20 of the Jurisdictional Statement, which property was determined by the trial judge to be the non-marital separate property of the husband.

The fact that no court below has addressed the constitutional issues (which have been briefed and argued below by both parties) raised by Appellant here, certainly does not imply or create a presumption, as Appellee argues, that these issues are insubstantial or are irrelevant to the decisions previously rendered in this case. To the contrary, the failure of the courts below to address these issues in their opinions, judgments and orders is all the more reason for this Court of last resort to do so; for while Appellee seeks to convince this Court that it is not credible to assert (as the Appellant

does) that the trial court applied statutes which the Supreme Court of Tennessee had already declared unconstitutional, as has been demonstrated above and in Appellant's Jurisdictional Statement, that is precisely what happened.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter and the Attorney General of the State of Tennessee with three copies of this Appellant's Brief in Opposition to Motion to Dismiss or Affirm by depositing in the United States Mail copies of same in properly addressed envelopes with adequate first class postage thereon addressed to:

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This 15 day of April, 1981.

T. CULLEN GILLILAND

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

LOHVLOHN H. REYNOLDS,	:	
	:	Appeal as of Right
Plaintiff-Appellant,	:	from the Circuit Court of Hamilton County
Versus	:	
	:	No. CA-536
HAROLD M. REYNOLDS,	:	Hamilton Law
	:	
Defendant-Appellee.	:	

BRIEF ON BEHALF OF APPELLEE

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Attorney for Appellee

APPENDIX F

. . . .

Husband having been awarded a divorce, TCA §36-826 comes into play. It provides as follows:

> 36-826. Relinquishment of defendant spouse's interest in plaintiff's estate and right to alimony.
>
> If the bonds of matrimony be dissolved at the suit of the plaintiff spouse the defendant spouse shall not be entitled to any part of the real or personal estate of the plaintiff spouse, in case of such plaintiff's intestacy nor to alimony. However, when the cause of divorce is irreconciliable differences under §36-801, the foregoing provision shall not apply if the parties have entered into a written property settlement

> agreement wherein the plaintiff consents to the payment to the defendant of alimony, either in a lump sum form or periodic payments, provided, that such property settlement is approved by the court granting the decree of divorce.

Thus, Mrs. Reynolds is entitled to no alimony, but the trial court was nonetheless required to make an equitable distribution of the marital properties under TCA §36-825.

. . . .